Commentary on

Australian Personal Property Securities Bill 2008

Submitted by

Independent Film and Television Alliance

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Gentlemen:

The Independent Film and Television Alliance (IFTA) is pleased to present this submission of its views to aid the Senate Standing Committee on Legal and Constitutional Affairs in evaluating the draft Personal Property Securities Bill 2008 ("PPSB").

As described in our previous submission to the Australian Attorney General's Office, we believe that it would be unwise to apply the PPSB in its current form to intellectual property. Indeed, so doing would ***significantly impair*** current intellectual property lending practices in Australia, especially for motion pictures, and raise ***serious conflicts*** with Australian intellectual property law and international obligations, including those under the TRIPS Agreement. We therefore urge the Committee to adjust the PPSB as described below to bring it into conformity with standard intellectual property law and practices.

1. Prior Submission:

Attached to this submission is a copy of our prior submission to the Australian Attorney General's Office regarding an earlier draft of the PPSB. While there have been some changes in the November 2008 draft, it appears that many of our concerns remain unaddressed. To keep this letter short, we will not repeat the analysis in our prior submission. Instead, we would like to provide an explanation and examples of the commercial distortions and legal conflicts that would be caused by applying the PPSB to intellectual property.

2. Commercial Context:

In principle, a secured creditor should be able to "step into the shoes" of its borrower and take the borrower's interest in the collateral in case of default. To be effective, therefore, a secured financing regime should work in harmony with the property rules for the assets used as collateral. As described in our submission, the PPSB seeks to establish a single financing system for both tangible chattels and intangible intellectual property. However, the rules for tangible property necessarily differ from those for intellectual property. The PPSB fails to appreciate this difference. Instead, it essentially applies the same financing rules both to tangible property and to intellectual property. This leads to commercial and legal distortions.

For example, the PPSB assumes that a conditional sale of goods, *i.e.* retention of title as security for payment, is functionally equivalent to a partial assignment of intellectual property with a right to cancel for non-payment, a completely different issue. The PPSB assumes a transfer of tangible collateral should "automatically" include associated intellectual property, ignoring the intellectual property "exhaustion" doctrine. The PPSB provides that a secured creditor should re-file to maintain perfection against a transferee of collateral. Tangible collateral is not subject to prior fractional title claims - one does not sell a car to A to drive in Melbourne on Monday and to B to drive in Canberra on Tuesday – so this rule makes commercial sense for chattels. But intellectual property is subject to tiers of assignments, licenses, sub-licenses and sub-sub-licenses, where continuous refilling makes no commercial sense. Yet under the PPSB, although an intellectual property *borrower's* interest extends to later transfers without the need for a new filing, the *lender's* interest does not, placing the secured financing law at odds with the property law for this type of asset.

For tangible goods, a buyer "in the ordinary course" takes free of prior title claims, so naturally the secured financing law allows such a buyer to take free of a security interest, as this is the normal commercial expectation. But the "ordinary course" concept does not apply to intellectual property where later licensees are subject to prior interests. Yet the PPSB, nonetheless, applying an "ordinary course" exception to intellectual property, with the practical consequence that borrowers and lenders, cannot use such licenses as a source of collateral. Moreover, since the ordinary course / non-ordinary course distinction has no antecedents in intellectual property law, one has no idea how to apply it in practice, leading to further confusion. Finally, the priority rules for security interests in the PPSB are at variance with the priority rules in the intellectual property statutes, leading to conflicts as to which party owns the *exclusive* rights.

The PPSB effectively makes an intellectual property security interest subject to the same exceptions and limitations as security rights for tangible chattels *even though those exceptions and limitations do not apply to the intellectual property interests themselves.* The practical consequence is to deprive intellectual property borrowers and lenders of a significant source of collateral, not to mention casting billions of dollars in existing long term financings into doubt and creating massive confusion in the marketplace. And for what? The Commentary gives no indication of the commercial policies supporting such a startling change other than an apparent whim to utilize the same financing rules for "crops, livestock, fire sprinklers, steel rods – and trademarks and patents." There is no analysis at all of the very different legal and commercial practices by which these assets are created, brought to market, and realize value.

There is also a serious legal problem. Under the PPSB, a secured creditor need not be an "owner" of intellectual property collateral in the sense of holder of full legal title (*e.g.* legal mortgagee). But a secured creditor is a transferee of the intellectual property (*e.g.*, equitable mortgagee) or at least a party entitled to invoke the protections of intellectual property statutes, *i.e.* to obtain an injunction against infringers to preserve the value of its collateral. As such, an intellectual property secured creditor is a "right holder" within the meaning of TRIPS and is entitled to TRIPS protections to the extent of its interest.

Moreover, one must ask: what happens when the secured creditor forecloses? At that point, the secured creditor does indeed transfer the intellectual property to a foreclosure sale purchaser, who is certainly a rights holder. The PPSB treats both a secured creditor and the foreclosure sale purchaser as subject to the same "property regime" as for tangible property. In effect, the PPSB is creating a vast range of "exceptions and limitations" to the intellectual property rights of two protected rights holders: secured creditors themselves, and their successors in interest through foreclosure. These "exceptions and limitations" go far beyond the "special cases that do no conflict with normal exploitation ... and do no not unreasonably prejudice the legitimate interests of the right holder" allowed by TRIPS Arts. 13, 17 and 30. As such, there is a significant issue whether applying the PPSB in its current form to intellectual property is consistent with Australia's international obligations.

One can appreciate the desire to modernize Australian personal property secured financing law that led to the PPSB. However, in crafting the PPSB, there was insufficient attention to the very different commercial practices and legal rules that support intellectual property asset financing. The following sections address some of these concerns.

3. Sec. 28: Clarify Ambiguous Treatment of IP Assignments as Security Interests

The PPSB is ambiguous about whether it intends to reclassify traditional outright and partial assignments of intellectual property as "security interests." Consider the following:

> **Example 1**: A grants B an exclusive licence of video rights in a copyrighted motion picture against a payment of royalties. B defaults and A terminates the licence. B claims A held a "security interest" and A failed to follow the procedures for foreclosure in the PPSB, including giving notice to B (Sec. 168), obtaining market value for B's interest (Sec. 169), paying B the surplus (Sec. 177), and according B a right to "redeem the collateral" (Sec. 180) or "reinstate the security agreement" (Sec. 181) by curing the default. B sues A for damages (Sec. 236). What result?

> **Example 2**: Same as Example 1 but A grants B a partial assignment of video rights. What result?

In Example 1, B's claim clearly fails because Sec. 28(a)(4) says a *licence*, which includes an exclusive licence, is not a security interest. In Example 2, under the Copyright Act, the partial assignment is the functional equivalent of the exclusive licence. But the same result may not follow because the Sec. 28(a)(2)(j) says an "assignment" that "in substance, secures payment or performance of an obligation" is now a "security interest." B claims the partial assignment was "security for B's obligation to pay royalties," like a deferred purchase plan. Section 28(a)(2)(d) says a traditional "conditional sale" contract is a security interest, and B argues the partial assignment is like a "conditional sale" in that A retained the right to "recover title" to the video rights by canceling the assignment in case of default. Thus, B claims A was required to comply with the PPSB to terminate the partial assignment, even though A is not be required to do so for the functionally equivalent "exclusive licence."

Standard outright and partial assignments of intellectual property with a right to terminate for non-payment are simply not equivalent to security rights. The failure of the PPSB to affirm this traditional and sensible commercial understanding is bewildering and will lead to commercial distortions.

4. Sec. 36: Do Not Treat IP Licences as Chattel Paper

Section 36 says that "chattel paper" means "one or more writings that evidence (a) a monetary obligation; and (b) a security interest in specific intellectual property or a specific intellectual property licence." This means that a piece of paper that evidences a security interest in intellectual property is "chattel paper." The commercial result is that one can "perfect" a security interest in intellectual property, with a right to take ownership on foreclosure, by taking mere possession of a piece of paper rather than obtaining a new instrument of transfer. Consider:

> **Example 3**: Producer owns a copyrighted motion picture. Producer grants SP1 a security interest in the motion picture evidenced by a unique electronic record (PDF file). SP1 does not file notice of its security right, but later transfer the

> record to SP2. Producer grants SP3, who is unaware of SP1 or SP2, a security interest in the motion picture. SP3 files a notice of its security interest. P defaults and both secured creditors foreclose. Which one owns the copyrighted movie?

SP2 claims that under Section 43(5) it has "possession" of the "unique electronic record" (PDF file) that evidences the security agreement and hence has "perfected" its security interest in the copyright by "possession." Since under Section 100(5) SP2 "perfected" before SP3 filed its notice, SP2 has priority. SP3 claims that under copyright law one cannot transfer *an interest in a copyright* by transferring a piece of paper evidencing the interest. Instead, one must execute a new instrument of transfer, *e.g.* an assignment. So, says SP3, since under copyright law the mere delivery of the PDF file to SP2 was insufficient to transfer any interest in the copyright collateral, then SP3 prevails. The PPSB provides no answer to this dilemma, which will doubtless inhibit commercial intellectual property lending.

The situation becomes more severe where patents or trademarks are involved and one must consider the recording rules under those statutes. Consider this example:

> **Example 4:** Inventor owns a patent. Inventor grants SP1 a security interest in the patent evidenced by a unique electronic record (PDF file) and the patent certificate. SP1 does not file a notice but transfers the records to SP2. Inventor then assigns the patent to BFP, who is unaware of the prior parties and records in the patent office. Inventor defaults and SP2 forecloses. Who owns the patent?

SP2, as above, claims that because it has "possession" of the patent certificate and PDF file, it has "perfected" first and so owns the patent. BFP claims, in reliance on the Patent Act, that patent ownership is transferred by an *assignment*, not by transferring possession of patent certificate and a document without a new instrument of transfer. BFP also claims that it was entitled to rely on the state of record title, and, since SP2 did not record, under Parent Act § 189, BFP prevails. The PPSB has no answer. However, in treating *possession of a record evidencing a transfer* as equivalent to a *transfer itself*, the PPSB has reversed centuries of legal practice.

What is the purpose of "chattel paper"? In the Nineteenth Century, there was an explosion of commerce in assets represented by pieces of paper. These included promissory notes, bills of lading, deposit passbooks and the like. There were no photocopying machines at the time, and under the rules of evidence, a party had to present the *original* writing (the "best evidence" rule) to collect on the obligation represented by the document. It was natural to assume that the party entitled to enforce the obligation would keep physical possession of the original document. Thus, the law developed the concept of "chattel" paper, *i.e.*, original documents evidencing an obligation. This was an extension of the older concept of "possessory" rights in tangible chattel applied "by analogy" to certain intangibles represented by unique documents. Despite the advent of modern photocopying machines, the practice continues due to its long history.

However, the concept of "chattel paper" never applied to intellectual property. One does not assign a patent by transferring the patent *certificate*. One does not transfer an intellectual property licence by handing over the licence document; one needs a new instrument assigning the licence. Treating intellectual property security agreements as "chattel paper" takes a Nineteenth Century legal "kludge" (*i.e.*, traditional legal practice of adjusting known legal constructs to new economic circumstances) and applies it inappropriately to assets where it has never been applied before. This is another example of ignoring established intellectual property law and practice, and instead improperly subjecting intellectual property to laws crafted for entirely different assets and commercial practices.

5. Sec. 38: Do Not Allow Descriptions of Tangible Goods to Automatically Include IP

Section 38 continues the concept that a "description of tangible property includes a description of intellectual property rights." As pointed out in our prior submission, this approach is in conflict with settled Australian intellectual property law and constitutes, in our view, a type of compulsory license incompatible with TRIPS obligations. In the November PPSB draft, Section 38 is slightly changed from the earlier version, but Paragraph 3.35 of the revised Commentary contains the same problematic example as contained in the prior Commentary, indicating that no substantive change was intended.

Fundamentally one may ask: does the "problem" Section 38 is attempting to "solve" even exist? Consider current law. If a consumer buys a microwave oven that contains a patented device or copyrighted software, does the sales receipt have to say, "Sold – one microwave oven plus associated patent and software rights?" If a lender today takes a chattel mortgage in the dealer's inventory of microwave ovens, is there any question that a description of "inventory of microwave ovens" is sufficient? The answer certainly is "No." That is because this issue is easily resolved *under existing intellectual property law* using what is commonly called the "exhaustion" doctrine. Typically, a manufacturer of goods acquires a licence to make and sell copies of any patented device or software used in the goods. This "exhausts" the sale or publication right, so that further sales of the goods are not infringing. There is no need to describe the chattel as "microwave plus intellectual property rights" because relevant intellectual rights are already exhausted. An issue only arises when the manufacturer has not obtained proper authorization, in which case the goods are pirated. In that case, no description by the seller of the pirated goods that they are "a microwave plus intellectual property" can excuse the piracy.

The problem with Section 38 is that it completely ignores this common understanding. If tangible goods are made under conditions that exhaust the intellectual property rights, then Section 38 is unnecessary. But if there is no exhaustion, then Section 38 now can be read as creating a compulsory right that allows a secured creditor rights in *pirated goods*. Consider:

> **Example 5:** Producer licenses Laboratory to make 100 DVDs (copies) of copyrighted motion pictures and sound recordings. Laboratory grants Lender a security right in its "inventory" of DVDs. Laboratory makes 1,000 DVDs, *i.e.*, 100 authorized and 900 unauthorized. Laboratory defaults. Lender forecloses and proceeds to (i) rent the 100 authorized DVDs and (ii) resell the 900 unauthorized DVDs. Producer sues for infringement. What result?

Lender claims that due to Section 38 the description of "inventory" also included Laboratory's licensed intellectual property rights. In particular, since the PPSB allows Lender to dispose of collateral by sale or lease (Secs. 166 *et seq.*), and since under Section 38(b)(2) "the exercise by the secured party of rights arising under the security agreement necessarily involves an exercise of intellectual property rights," Lender claims it can engage in rental of the authorized DVDs, even though rental rights were not granted to Laboratory, and it can also sell the unauthorized DVDs.

The failure to realize that tangible chattels are separate collateral from intangible intellectual property can also validate "secret liens." Consider:

> **Example 6**: D manufactures jeans. It has trademark licenses authorizing D to make jeans for fashion designers. D also makes jeans under its own trademark. D has 1000 jeans on its premises, some of which are made for the fashion designers, some of which are D's own. D grants SP1 a security interest in its "inventory." SP1 files a notice that only states it has a security interest in "inventory." D then grants SP2 a security interest in "all IP." Which party, SP1 or SP2, has a security interest in the IP licences from the designers? If SP1, does its security interest only extend to D's existing jeans in inventory, or does it include the right to make new jeans under licence? Does SP1's security include D's IP? How could SP2 find out from reading SP1's notice?

In this example, Section 38 actually creates confusion and allows "hidden" security interests undisclosed by a public notice.

The simple point is that tangible chattels and intellectual property are separate assets. If the intellectual property rights in the inventory have been exhausted, then Section 38 is unnecessary. If not, then the parties should identify each item of separate collateral in their security agreement and accompanying notice.

6. Section 73: Eliminate Requiring Continuous Filings to Maintain Perfection

Section 73 (Section 69 in the prior draft) deals with the situation when collateral is "transferred." It says a perfected security interest in transferred collateral only remains perfected for a limited time unless the secured creditor takes additional steps to ensure perfection against the transferee. Intellectual property is routinely transferred through tiers of partial assignments, licences, sub-licences, and sub-sub-licences. As discussed in our submission, the PPSB would require an intellectual property secured lender to make continuous filings against all these subsequent transferees to maintain its perfected security right.

Such a requirement creates a crushing commercial burden on intellectual property lenders. "Upstream" intellectual property lenders often do not know about remote "downstream" sub-transferees and have little ability to ensure constant filings against them. Under current law, however, the lenders know their security right remains effective against them without re-filing. Changing that requirement will impose staggering costs on such lenders, which will invariably be passed on to borrowers, dramatically increasing the cost of financing. Consider:

> **Example 7**: P desires to produce a movie in Australia and obtains a loan from Bank to finance production. Bank takes a security right in the motion picture copyright. P then grants D1 exclusive exploitation rights in Australia. D1 then grants 100 individual exhibition licences to theaters, 25 sublicences to local video dealers who make and sell DVDs to stores, and 25 television broadcast licences to local satellite, pay and free television stations. P defaults and Bank forecloses its security right. Bank then tries to collect royalties, *i.e.*, proceeds from the IP rights, from the licensees and sublicensees to cover its loan. They all claim that since Bank did not file against them individually, Bank has no claim to the royalties and, moreover, their licences are superior to Bank's rights. What result?

Under current law, each transfer in the chain of title takes subject to prior transfers, so that termination of a prior transfer terminates all junior transfers (unless agreement is made otherwise with a prior party). This includes security interests. As a result, a later transferee *must already search chain of title to ensure its intellectual property interest is valid*. In such a search, it is routine to include prior security interests. This is standard due diligence practice.

So why does the PPSB now deprive intellectual property lenders of the same benefits and require them to make continuous filings against remote transferees to maintain priority? Since remote transferees must already search for prior parties, it is a trivial additional cost to include secured lenders in the search. But the cost of making constant filings against remote transferees is a crushing burden. The PPSB seems determined to relieve remote transferees of a trivial additional due diligence cost at the expense of imposing a staggering burden on "upstream" intellectual property lenders. Why? The practical result will only be to make loans to intellectual property creators, inventors, and innovators cost-prohibitive and commercially unattainable. What is the justification for that?

The effect of Section 73 could also be to resuscitate an ancient fraud known as "mortgage milking." Consider:

> **Example 8:** P owns IP and obtains a loan from Bank secured by the IP and expected royalties from licences. The security agreement gives Bank the right to pre-approve all licences. Unbeknownst to Bank, P grants several licences for below market royalty rates but high up-front "advance royalty" payments. P takes the up-front payments and flees for parts unknown. Bank forecloses its security interest and tries to terminate the improvident licences. The licensees claim that since Bank was not "perfected" as to them, their licences cannot be terminated.

During the Great Depression this practice was all too common, although it typically involved advance rental payments for leases of real property. The foreclosing lender was allowed to terminate the leases since they were junior to the prior recorded real property mortgage. The same should apply to intellectual property under current law, *i.e.*, unauthorized licences remain junior to a prior perfected security right, and there is no need to re-prefect against each subsequent licensee. By reversing this requirement, the PPSB creates grounds for mischief.

TRIPS Art. 62(1) says: "Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for in Sections 2 through 6, Part II, compliance with *reasonable* procedures and formalities." While this provision was likely drafted with the procedures for acquisition of rights in mind, it is not so limited. The requirements in the PPSB of requiring continuous filings by secured creditors to maintain priority against remote transferees would seem to fail the test of commercial reasonableness.

7. Sections 87 & 99: Eliminate "Ordinary Course" Exception to IP Security Interests

Section 87 (Section 82 in the prior draft) allows a person who "purchases" an interest "in the ordinary course of the transferor's business" to "take free" of a security interest granted by the transferor. The earlier draft said "acquires," but changing the term to "purchases" seems merely cosmetic. The term "purchases" is undefined in the PPSB, but in common usage has a broader meaning than "buys." A "purchaser" includes assignees, exclusive licensees (arguably) and other secured creditors. Indeed the relevant IP statutes refer to bona fide *purchasers* of the IP, indicating a "purchase" does indeed apply to IP interests.

Similarly, Section 99 is unchanged from Section 91 in the prior draft. It allows a buyer of tangible property "in the ordinary course of business" to "take free" of a security interest in associated intellectual property that the intellectual property owner was forced to recognize under Section 38.

Both Sections 87 and 99 leave unresolved the issues we raised in our prior submission. As we mentioned, Sections 87 and 99 are arguably creating an "exception and limitation" to the exclusive distribution rights (TRIPS Art. 9) and rental rights (TRIPS Art. 11) guaranteed to copyright right holders in a manner which does not qualify under TRIPS Art. 13.

Australian intellectual property does not recognize an "ordinary course" exception to the distribution or rental rights of other copyright owners. That is, an "ordinary course" licensee (whatever that means) does not take free of the *licensor's* intellectual property interest or those of prior parties in the chain of title. So why should they take free of a *lender's* rights? A secured creditor should be able to "step into the shoes" of its borrower and have the same rights against subsequent licensees as its licensor/borrower has. By saying that "ordinary course" parties take free of a security right the PPSB prevents both intellectual property borrowers and their lenders from using "ordinary course" licences as collateral. And since there is no concept of an "ordinary course" versus "non-ordinary course" licence in IP law, the result will be massive uncertainty about available collateral. The commercial consequence will be to significantly impair IP lending for little more than a whim. What is the commercial purpose of that?

As mentioned in our submission, for tangible goods there is a normal expectation that a buyer of goods in ordinary commerce from an authorised dealer takes free of prior title claims in the goods. Thus, the secured financing law naturally excludes such ordinary course buyers from a security right to fulfill normal commercial expectations. For intellectual property, however, the expectations are not the same, and there is a common understanding that licences of the intellectual property will be subject to prior title claims. In this context, an "ordinary course" exception is contrary to normal commercial expectations, frustrates the ability of both IP borrowers and lenders to use effectively their IP as collateral, and deprives IP lender of IP rights guaranteed to other rights holders contrary to TRIPS requirements.

To see the commercial consequences, consider the following:

> **Example 9**: D publishes word processing software. It distributes copies to the business market at one price and to the educational market at a lower price. D grants Bank a security interest in its software. P acquires copies under an "educational use" only licence but distributes them in the business market for a higher price. D's business customers, undercut by a flood of low cost educational copies, refuse to pay and D goes belly-up. Bank forecloses and sues P for infringement. P claims it acquired the copies "in the ordinary course" and hence takes free of Bank's security right, so that Bank cannot stop P. What result?

Under intellectual property law, D, if still extant, could certain stop the piracy by P. But the "ordinary course" exception in the PPSB deprives Bank, and its successor in title by foreclosure, from so doing. As such, the "ordinary course" concept simply does not conform to reasonable commercial expectations for intellectual property. Instead, given the ease of copying, intellectual property is commonly subject to licence terms that allow arbitrage to establish markets. By making intellectual property security interests subject to an "ordinary course" exception, the PPSB effectively prevents lenders and their successors in interest by foreclosure from realizing value for their intellectual property assets as well as constituting and unauthorized "exception and limitation" on their intellectual property rights.

8. Section 100: Provide That the IP Priority Rules Prevail Over the PPSB

As pointed out in our submission, there is a significant conflict between the priority rules in the PPSB (Sections 100 *et. seq.*) and those in the current intellectual property statutes. We provided numerous examples of these conflicts. As we mentioned, the international intellectual property conventions, including TRIPS, do not require the adoption of any particular priority rules. However, they do require according rights holders *exclusive* rights. TRIPS Art. 41 then requires enforcement procedures that "permit effective action" against infringement of these exclusive rights. Priority rules determine which party *owns* the intellectual property rights in case of conflicting transfers, and ownership determines which party can exercise *exclusive* rights. Where priority rules give conflicting answers about which party owns the exclusive rights, the rights are not longer exclusive and that a right holder has been denied effective remedies. Thus, it is essential that any priority rules they give complete and consistent answers about ownership.

Section 120 of the PPSB provides that interests created under other laws can have priority over a security interest under the PPSB under the conditions stated. This indicates that there is no policy objection to allowing other laws to create priority rules that supersede the PPSB when appropriate for the assets covered by those other laws. Intellectual property is such an asset. It is unclear whether Section 120 would embrace intellectual property. Section 120 should be clarified to indicate that security interests can indeed be recorded in the applicable Australian patent and trademark registries, and that those recordings whenever made take priority over any security interest under the PPSB. In addition, Section 120 should affirm that a security interest under the PPSB is a type of "transfer" (*e.g.*, conditional assignment) under the intellectual property statutes, including for copyrights, and that the priority rules in the intellectual property statutes prevail in case of conflict with those in the PPSB.

9. Section 121: Provide That Execution Creditors Are Subject to IP Priority Rules

Section 121 (Section 113 in the prior draft) continues the bewildering rule that an execution creditor prevails against an intellectual property security right *at the time of execution* rather then when it is perfected as under current law. Consider:

> **Example 6**: D owns a patent in Australia which it wants to use a security for a loan. Bank searches the patent register and finds no prior transfers recorded, and so make the loan to D. Unbeknownst to Bank, C had previously obtained a judgment and execution against D in Perth requiring D to assign the patent to C. However, C never recorded its execution sale assignment in the patent office. C now claims it owns the patent and D's security interest is invalid.

As explained in our submission, Bank is a *bona fide purchaser* (lender) entitled to rely on the state of record patent title under Patent Act § 189(1). As such, Bank should prevail since C's assignment as a result of the execution was unrecorded in the patent records. But Section 121 of the PPSB now says that C's execution prevails against B's later security interest *from the time of execution regardless of whether C took steps to record in the patent office*. This means that a lender against patents or trademarks in Australia can no longer rely on the integrity of the patent and trademark registers. Instead, the lender must conduct a search of every local courthouse throughout the country to ensure that there are no existing but unrecorded execution sales against its borrower. Again, what is the commercial justification for that?

If Bank was an *assignee* of the patent instead of secured creditor, Bank would certainly prevail over C under Patent Act § 189. Why does the PPSB discriminate against intellectual property *lenders* and deny them protections accorded to other intellectual property rights holders? Surely, it is a trivial change for Section 121 to provide that the "time of execution" means the time when the court has issued an order *and the execution creditor has taken any steps necessary under other laws to give its interest priority over competing interests*. For tangible property, this occurs as soon as the creditor takes possession by levy, so this is no additional burden. But it has a substantial impact on intellectual property.

10. Conclusion

As discussed, the PPSB routinely treats intellectual property collateral as if it were subject to the same commercial rules as tangible property. It then takes the exceptions and limitations to security rights appropriate for tangible chattels and applies them inappropriately to intellectual property. The commercial result is to deprive intellectual property borrowers and lenders of a valuable source of collateral, as well as creating serious legal distortions in intellectual property law. Why? Why does the PPSB not allow intellectual property lenders to "step into the shoes" of their borrowers and have the same treatment as other intellectual property rights holders? Why does the PPSB continually ignore standard intellectual property law and commercial practices and insist on rules that decimate rather than encourage intellectual property lending? Where is there any discussion in the Commentary of the justification for such harsh treatment? Where is there any realization that so doing deprives protected right holders of their rights guaranteed under the international conventions, including TRIPS?

The PPSB is flawed in its treatment of intellectual property assets. We hope this paper has provided some guidance on areas of concern. We look forward to providing the Committee any further commentary it may desire on how to amend the PPSB to encourage intellectual financing in Australia and to maintain conformity with Australia's international obligations.

Respectfully submitted by,

Independent Film & Television Alliance